Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

REGINALD AKINS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The Court States Court Of Appeal
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Brief for the Petitioner

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QUESTIONS PRESENTED

Whether Petitioner's rights under the Fifth and Sixth Amendment under the United States Constitution were violated when:

(1) both the District and Circuit Courts ruled that on grounds of stare decisis, *Harris v. United States* precluded imposition of a mandatory five year sentence pursuant to §924(c) that reflect the jury's factual determination that Petitioner possessed rather than brandished a firearm;

(2) the District Court, in imposing Petitioner's sentence, disregarded a jury's factual determination that Petitioner possessed rather than brandished a firearm beyond reasonable doubt and instead made an independent factual determination using the less stringent standard of the preponderance of the evidence, that Petitioner brandished a firearm.

QUESTIONS PRESENTED

Whether Petitioner's rights under the Fifth and Sixth Amendments under the United States Constitution were violated when:

(1) both the District and Circuit Court ruled that on grounds of stare decisis, *Harris v. United States* precluded imposition of a mandatory five year sentence pursuant to § 924(c) that reflected the jury's factual determination that Petitioner possessed rather than brandished a firearm;

(2) the District Court, in imposing Petitioner's sentence, disregarded a jury's factual determination that Petitioner possessed rather than brandished a firearm beyond a reasonable doubt and instead made an independent factual determination using the less stringent standard of the preponderance of the evidence, that Petitioner brandished a firearm.

PARTIES TO THE PROCEEDINGS

Petitioner is Reginald Akins. Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B) is reported at 2007 U.S.App.Lexis 679. The sentencing order of the District Court is unreported. (Pet. App. C.)

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 2007. (Pet. App. A.) This petition for Writ of Certiorari was filed on April 9, 2007. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be deprived of life, liberty or property without due process of law."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

18 U.S.C. § 924(c)(1)(A) states, in relevant part:

Any person who, during and in relation to any crime of violence or drug trafficking crime…uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime or violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than five years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than seven years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT

On or about May 20, 2002, a jury convicted Reginald Akins ("Petitioner") of committing two counts of armed robbery (18 U.S.C. §2113(a) and (d) counts one and two), two counts of knowingly possessing, carrying or using a firearm during the commission of the robberies (18 U.S.C. §924(c), counts three and four), and one count of being a felon in possession of a firearm (18 U.S.C.§922(g)(1), count five). Prior to deliberations, a jury was asked to decide whether Petitioner "possessed, brandished or discharged a firearm" during the commission of the robberies. The jury determined that Petitioner had possessed a firearm but did not brandish nor discharge it.

At sentencing, the District Court imposed a sentence of 384 months or 32 years plus three days. The consecutive sentence was comprised of one day each on counts one and two, 84 months on count three, 300 months on count four, and one day on count five. With respect to count three, the District Court rejected the jury's determination that Petitioner possessed a firearm during the robberies, but found instead, by a preponderance of the evidence, that the firearm had been brandished. Therefore, pursuant to §924(c)(1)(A)(ii),[1] the court imposed an 84 month (seven year) sentence as opposed to 60 months (five years) for possession as determined by the jury.

After appealing his conviction and sentence, the Ninth

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[1] 18 U.S.C. § 924(c)(1)(A) states in relevant part:
Any person who, during and in relation to any crime of violence or drug trafficking crime…uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime or violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than five years;
(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than seven years;
(iii) and if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Circuit Court of Appeals affirmed them both on June 22, 2004. (*See* 102 Fed. Appx. 88.)

On September 15, 2004, Petitioner filed a petition in this Court for a Writ of Certiorari. This Court vacated the judgment and remanded his case for reconsideration in light of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 159 L.Ed.2d 158(2004). (*See* 125 S. Ct. 1014).

On July 26, 2005, the Ninth Circuit ordered the District Court to reconsider its sentence for purposes of determining whether it would be materially different under *United States v. Booker*. (Pet. App. D).

Relying upon *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348(2000), *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403(2004) and *Booker*, Petitioner contested the District Court's reliance on its factual determination that Petitioner had brandished the firearm, rather than accepting the jury's factual determination that he had possessed the firearm. As the Court's factual determination was not based solely on "the facts reflected in the jury's verdict," *Blakely v. Washington*, 542 U.S. at 303, Petitioner argued that the Court "exceeded [its] proper authority," by imposing an 84 month sentence that exceeded by two years the 60 months that more accurately reflected the "jury's verdict alone." *Id.* Thus, in light of *Apprendi*, *Blakely* and *Booker*, Petitioner urged the District Court to re-sentence him to 60 months on count three. (Pet. App. E).

At the February 1, 2006 resentencing hearing, District Court Judge Charles R. Breyer, in reviewing the arguments for and against the imposition of a different sentence under *Booker*, stated "...I think that there is something to be said for giving him a sentence that doesn't include the brandishing. Even though I saw evidence of brandishing, it was not a jury determination. And so, I—I think he is entitled to resentencing." (Pet. App. F at 4.) Judge Breyer further stated that a two year difference in Petitioner's sentence was indeed material and "a 360 month sentence as distinct from a 384 month sentence [was] more reasonable." (Pet App. F at 4). When reminded that at the time of the original sentencing *Blakely* and *Booker* had not been decided, Judge Breyer stated that "...had I been aware

of *Blakely* at the time I sentenced Mr. Akins, and further, had the jury rejected the brandishing finding, notwithstanding my disagreement with the jury—or maybe not, maybe I would have agreed with the jury."(Pet. App. F at 15). Even more affirmatively, Judge Breyer stated "Because having the jury hear it, having it being (sic) presented to the jury and the jury not adopted (sic) it, you know, I—I wouldn't accept it." (Pet. App. F at 16).

At the March 8, 2006 resentencing hearing, Judge Breyer declared if "under all the circumstances and if I were to apply 3663(A)[sic] to the sentencing, I may very well enter a different sentence if I had discretion to do so. I don't think I do. I may be wrong. As a matter of fact, I hope I'm wrong." (Pet. App. G at 3).

Thus, in his order of March 8, 2006, Judge Breyer held that although he was in agreement with the Ninth Circuit that *Harris v. United States*, 536 U.S. 545, 153 L.Ed.2d 524, 122 S.Ct. 2406 (2002) is "difficult to reconcile with the Supreme Court's recent Sixth Amendment jurisprudence," (Pet. App. C at 2) he was bound to follow it as he was bound to follow the Ninth Circuit's decision in *Dare v. United States*, 425 F.3d 634 (9th Cir.2005) which held that *Harris* had not been expressly overruled. Thus, Judge Breyer held that "if [he] had the discretion to do so, [he] would resentence Akins." (Pet. App. G at 3).

Reasoning that *Blakely* and *Booker* did indeed provide Judge Breyer with the discretion to re-sentence Petitioner to 60 months on the §924(c) conviction, Petitioner appealed the District Court's order to the Ninth Circuit Court of Appeals on or about March 17, 2006.

On or about January 9, 2007, the Ninth Circuit filed an unpublished opinion affirming the District Court's order. In its opinion, the Ninth Circuit relied exclusively upon its earlier decision in *United States v. Dare*, 425 F.3d 634 (9th Cir. 2005) in which it "upheld the continued use of mandatory minimum sentences based on judicial factfinding as allowed by the Supreme Court's opinion in *Harris v. United States*, 536 U.S. 545, 568 (2002)."(Pet. App. B). However, the Ninth Circuit also stated in *Dare* that it found it difficult to reconcile *Harris*

with "the Supreme Court's recent Sixth Amendment jurisprudence" but nonetheless, it was required to follow *Harris* because it had not been expressly overruled by this Court. *Dare*, 425 F.3d at 641.

It is upon this confusion expressed by the Ninth Circuit in *Dare*, as well as other Circuit courts, that Petitioner respectfully requests that this Court definitively pronounce that the reasoning in *Apprendi*, *Blakely* and *Booker* had effectively overruled the reasoning in *Harris v. United States* and that therefore, the distinction made heretofore between "minimum" and "maximum" sentences, can no longer coexist with a defendant's Sixth Amendment rights as interpreted by this Court's *Apprendi*, post-*Harris* jurisprudence.

PREFACE

Using stare decisis, both the District Court and the Ninth Circuit Court of Appeals have refrained from answering the question of whether the reasoning in *Apprendi* as carried forth by *Blakely v. Washington*, *Booker v. United States*, and most recently in *Cunningham v. California*, 549 U.S.___, 127 S.Ct. 856, 166 L.Ed.2d 856(2007) has in fact overruled *Harris v. United States*. These two lower courts effectively, "passed the buck" by expressly stating that even though it appeared that *Harris* was no longer sound law after *Blakely* and *Booker*, they were nevertheless bound by it due to this Court's silence on the precise issue of *Harris'* viability. Specifically, the District Court, in rejecting Petitioner's arguments that *Blakely* and *Booker* required a jury's beyond a reasonable doubt determination of whether Petitioner possessed or brandished a firearm, stated "if [he] had the discretion to do so, [he] would resentence Akins" to five rather than seven years to reflect the jury's finding. However, "as a District Court... [he] was bound by *Dare*... [and] does not have the discretion to resentence Akins until the the Ninth Circuit orders otherwise." (Pet. App. C at 2). Similarly, the Ninth Circuit refused to revisit its opinion in *Dare*; it too "passed the buck" when it stated in *Dare* that the reasoning in *Harris v. United States* "is difficult to reconcile with the Supreme Court's recent Sixth Amendment

jurisprudence," 425 F.3d at 641 but that nonetheless it must follow *Harris* because it has not been expressly overruled by the Supreme Court.

Several other Circuits have also expressed concern that *Harris* is no longer "good law" but that they were also bound to apply it when, and until this Court expressly states otherwise. See, *United States v. Jones*, 418 F.3d 726, 732(7th Cir.2005) (although there may be some tension between *Booker* and *Harris*, as to the extent that *Booker* has unsettled *Harris*, it is the Supreme Court's prerogative--not ours to say so); *United States v. Groce*, 398 F.3d 679, 682, n.2 (4th Cir. 2005) (sentences pursuant to *Harris v. United States* are problematic after *Booker*); *United States v. Williams*, 464 F.3d 443, 449(3d Cir. 2006)(*Harris* survives because *Booker* did not explicitly overrule *Harris* nor did *Booker* "make any reference to *Harris*"); *United States v. Mackie*, 157 Fed. Appx. 378(2d Cir. 2005)(unreported opinion)(regardless of the merits of this argument, we must reject it...as this Court must adhere to Supreme Court precedent unless and until the Supreme Court itself overrules it). Although other Circuits have definitively concluded that *Harris* remains "good law" after *Blakely* and *Booker*, it is true that this Court has not yet definitely spoken on the issue.

Thus, when coupling the existing uncertainty on the continuing viability of *Harris* after *Blakely* and *Booker* with the inherent restraint shown by Circuit courts and justified on grounds of stare decisis,[2] the due process rights of defendants, like Petitioner, are being inexcusably compromised. [3]

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[2] See, for e.g., *United States v. Duncan*, 413 F.3d 680, 683(7th Cir. 2005)(even if the logic and spirit of those decisions could be interpreted to have eroded the Court's previous rationale for permitting mandatory minimum sentences based on judicial factfinding, it is certainly not our role as an intermediate appellate court to overrule a decision of the Supreme Court or even to anticipate such an overruling by the Court). But see, *Utah v. Nevada Co. v. DeLamar*, 133 F.113, 120 (9th Cir. 1904)(Supreme Court has since, as well as before laid down the rules by which we must be guided; and, if there is a conflict between them, the later decisions must govern and control our actions); *Burnet v. Coronado Oil & Gas Co.* 285 U.S. 393, 406, fn.1(1932)(no interest which could be served by so rigid an adherence to stare decisis is superior to the demands of a system of justice based on a

Nevertheless, Petitioner now stands at the door of the forum that is charged with the constitutional authority to definitively decide the viability of *Harris* after *Blakely* and *Booker*. As the following arguments will attest, *Harris'* distinction between "minimum" and "maximum" sentences can no longer co-exist with both the reasoning inherent in this Court's *Apprendi* and post-*Harris* Sixth Amendment jurisprudence, as well as with *Booker's* repudiation of the "mandatoriness" of the now advisory Sentencing Guidelines.

See, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 857, 1125 S.Ct. 2791, 2810, 120 L.Ed.2d 674(1992)(a decision is properly overruled where development of constitutional law since the case was decided has implicitly

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considered and consistent application of the constitution); Paulsen, Michael Stokes, Accusing Justice: Some Variations on the Themes of Robert M. Cover's, "Justice Accused," 7 J.L. & Religion 33, 85 (1990)(while it might be thought a breach of decorum for an inferior court to repudiate a precedent of a superior tribunal, such conduct is not constitutionally insubordinate and is clearly not categorically improper); Camiker, Evan, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decision Making, 73 Tex. L. Rev. 1, 17-18(1994)(sometimes the demise of an old Supreme Court precedent is foreshadowed by newer binding precedents that are inconsistent with the reasoning or result of the old case. In such circumstances, an inferior court might conclude that the newer precedents implicitly overrule the old. Because the inferior court reaches this conclusion simply by interpreting binding precedents, the court can fairly be characterized as following the precedent mode); See also, *Cooper v. MRM Inv. Co.*, 367 F.3d 493(6th Cir. 2004)(precedent making decisions...may be overruled...by implication so that a later decision overrules prior decisions which conflict with it whether such prior decisions are or are not mentioned).

[3] See, *United States v. Reveron-Martinez*, 836 F.2d 684, 693(1st Cir. 1988)(in the criminal context, mechanical application of stare decisis can deprive a defendant of a more fundamental due process interest, the right to a day in court); *Northwest Forest Resource Council v. Dombeck*, 107 F.3d 897(D.C. Cir. 1997)(to the extent that a rigid application of stare decisis deprives one of their right to an opportunity to be heard, it raises a due process issue); See also, Barnett, Amy Coney, Stare Decisis and Due Process, Univ. Co. La. Rev., Vol. 74, p. 1011, 1015(2003)(to the extent that a court applies the rules of stare decisis in a way that makes it impossible for a litigant to convince a court to overrule erroneous precedent, the court deprives that litigant of a hearing on the merits of her claim);

or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking).[4] Thus, Petitioner respectfully requests that this Court expressly state what has otherwise been implicitly understood, that *Harris v. United States* has been overruled by its holdings in *Blakely* and *Booker*.

SUMMARY OF ARGUMENT

As this Court most recently reaffirmed in its holding of *Cunningham v. California*, 127 S.Ct. 856, the Sixth Amendment requires that "*any fact* that exposes a defendant to a greater potential sentence must be found by a jury, and not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham*, 127 S.Ct. at 868(Emphasis added). Petitioner argues that the language relied upon in *Cunningham* in defining the reach of the Fifth and Sixth Amendments, clearly illustrates that the distinction the Court otherwise relied upon in *Harris v. United States* where, a defendant's constitutional rights were triggered depending on whether the elevated sentence was the minimum or maximum, is no longer the standard the Court adheres to. Beginning with *Apprendi* and continuing through *Blakely* and *Booker*, this Court, by reaffirming its reliance upon the principles underlying the Fifth and Sixth Amendments, has incrementally broadened the language used in articulating the scope and reach of the Amendment's protections. *Booker* 240 (more important than the language used in...*Apprendi* are the principles we sought to vindicate. Those principles are...not the product of recent

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[4] See also, *United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 2319, 132 L.Ed.2d 444(1995)(stare decisis may yield where a prior decisions underpinnings have been eroded by subsequent decisions of this Court); Douglas, Stare Decisis, 49 Colum.L.Rev. 735, 736(1949)(a judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he [or she] remembers above all else that it is the constitution which he [or she] swore to support and defend, not the gloss which his predecessors may have put on it).

innovations in our jurisprudence, but rather...in the ideals our constitutional tradition assimilated from the common law).[5]

In particular, the Court's change in definition of "mandatory maximum" from "the prescribed statutory maximum" in *Apprendi*, 530 U.S. at 490 to "facts reflected in the jury verdict or admitted by the defendant," in *Blakely*, 542 U.S. at 304 clearly illustrates the Court's movement after *Harris*, towards restoring to the jury's purview, factual determinations that increase a defendant's sentence as required of that body under the Sixth Amendment. Additionally, as first articulated by Justice Thomas in his concurrence in *Apprendi*,

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[5] The Third Circuit Court in *United States v. Grier* has very recently summarized this Court's articulation of some of the relevant principles underlying the protections embodied within the Fifth and Sixth Amendments.

> It has been settled throughout our history that the Constitution protects every criminal defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 365, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511, 132 L.Ed.2d 444, 115 S.Ct. 2310(1995). These basic precepts, firmly rooted in common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures. The Constitutional guarantees of "trial...by an impartial jury," U.S. Const. Amend. VI, and "due process of law, U.S. Const. Amend. V, stand as a bulwark of individual liberty. They interpose between the legislature and the court the community's own judgment as to the existence of a crime. Only if a jury of an individual's peers concludes beyond a reasonable doubt that he or she committed each element of the charged offense, as defined by the legislature, may the court impose punishment. *Booker*, 543, U.S. at 230. This principle is rooted in common law considerations of fundamental fairness. *Blakely v. Washington*, 542 U.S. 296, 301-02, 305-07, 311-12, 124 S.Ct.2531, 159 L.Ed 2d 403(2004)...Under the Fifth and Sixth Amendments, individuals have a right to demand that each and every element of the alleged crime be submitted to a jury and proved beyond a reasonable doubt before sentence is imposed."

United States v. Grier, 2007 U.S. App. Lexis 2483.

the Court's implicit adoption of the broader definition of an "element of a crime," i.e., "whatever is in law essential to the punishment sought to be inflicted," *Apprendi*, 530 U.S. at 467(Thomas, J. concurring, (as cited in *Blakely*, 542 U.S. at 304 and *Booker*, 543 U.S. at 233) again illustrates the Court's change in perspective since *Harris*. As a significant justification for its holding in *Harris*, this Court's analysis of whether a fact was an "element" or a "sentencing factor" relied upon a more narrow definition than the one subsequently embraced by this Court in *Blakely* and *Booker*. Thus, this change irrevocably impacts its holding in *Harris* and as such, *Harris* is no longer good law and therefore, should be expressly overruled.

Petitioner also argues herein that the rationale underlying this Court's express repudiation of the "mandatory" nature of the Federal Sentencing Guidelines equally applies to mandatory minimum sentences, and thus, this Court's holding in *Booker* also serves to overrule its earlier holding in *Harris v. United States*. See, *Booker*, 543 U.S. at 236(the new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime[s] [including mandatory minimums]).

ARGUMENT

I.

WITH THE COURT'S CLARIFICATION OF ITS HOLDING IN *APPRENDI*, *HARRIS* HAS BEEN EFFECTIVELY OVERRULED.

In *Harris v. United States*, petitioner challenged the District Court's imposition of a seven year sentence pursuant to §924(c) when the fact used by the Court, i.e., that he brandished a firearm, had not been alleged in the indictment nor proven at trial. Rather, the judge unilaterally found by a preponderance of the evidence that petitioner brandished a firearm. Pursuant to §

924(C), brandishing exposed a defendant to a seven year sentencing enhancement. Petitioner argued that the Court's finding violated his Fifth and Sixth Amendment rights as articulated by this Court in *Apprendi*. *Harris*, 536 U.S. at 551.

In *Harris*, this Court primarily focused on the distinction between an "element" and a "sentencing factor"; it held that the former, not the later required constitutional guarantees of a jury and proof beyond a reasonable doubt. *Harris*, 536 U.S. at 549. The Court was quick to add however that not all facts effecting punishment were elements although they might impact a defendant's sentence; i.e., a judge could impose a sentence within a range provided by statute and could rely upon facts pertaining to the defendant and the manner in which the offense was committed in rendering an appropriate sentence. The Court held that "though these facts may have a substantial impact on the sentence, they [were] not elements," and thus "not subject to the Constitution's indictment, jury and proof requirements." *Harris*, 536 U.S. at 549. The Court made this distinction early on in the opinion in order to distinguish the assertion made in *Apprendi*, in particular, by Justice Thomas in his concurrence, in which he argued that it was well established in common law that if a statute increased the punishment of a common law crime on some fact, then that fact must have been charged in the indictment; that the indictment must allege "whatever is in law essential to the punishment sought to be inflicted."[6] *Harris*, 536 U.S. at 467, 506 (Thomas, J. concurring). In other words, any fact that increases a punishment is an "element" and thus, a defendant is afforded Fifth and Sixth Amendment protections when that "element" is relied upon to increase a sentence. *Apprendi*, 530 U.S. at 501(a "crime" includes every fact that is by law a basis for imposing or increasing punishment)(Thomas, J. concurring). If the *Harris* court recognized and accepted this analysis, the distinction it

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[6] An accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," *Apprendi*, at 510, citing, 1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872). Thus, "a crime includes every fact that is by law a basis for imposing or increasing punishment ," *Apprendi*, 530 U.S. at 501.

ultimately made between facts extending statutory minimums and facts increasing statutory maximums would have been logically unsound.

Nevertheless, the Court found that brandishing was a traditional sentencing factor. *Harris*, 536 U.S. at 553-557. The Court then addressed the question of whether *Apprendi* overruled *McMillan v. Pennsylvania,* 477 U.S. 79, 91 L.Ed.2d 67, 106 S.Ct. 2411(1986). *McMillan* involved a constitutional challenge to Pennsylvania's Mandatory Minimum Sentencing Act. That statute, like the statute in question at bar, dictated that anyone convicted of certain felonies was subject to a mandatory minimum sentence of five years if the sentencing judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the offense. McMillan, 477 U.S. at 81-82. This Court found the statute constitutional, holding that the statute "operated solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding." Id. at 88.

As the *Apprendi* rule did not exist at the time McMillan was decided, it is in *Harris* that this Court first embraces the *Apprendi* rule in order to rebut petitioner's argument that facts extending statutory minimums must be determined by a jury beyond a reasonable doubt. The *Apprendi* rule states that "other than a fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt," *Apprendi*, 530 U.S. at 490. The *Harris* court concluded that facts extending statutory minimums were unaffected by *Apprendi* in that the jury's verdict itself authorized the judge to impose sentence anywhere within the statutory range up to the maximum. *Harris*, 536 U.S. at 557. The Court stated that a judge's ability to determine a fact in order to extend a statutory minimum was no different than the ordinary discretion he or she had in sentencing within the statutory range; as long as the fact did not "swell the penalty above what the law has provided for the acts charged." *Harris*, 536 U.S. at 561-562. On the other hand, the *Apprendi* rule did apply to facts that extended a sentence beyond the statutory maximum as such facts "had

traditionally been charged in the indictment and submitted to the jury because the function of the indictment and jury had been to authorize the State to impose punishment." *Harris*, 536 U.S. at 564. Thus, *Harris* concluded,

> whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries and without contradicting *Apprendi*.

Harris, 536 U.S. at 565.

In his dissent in *Harris*, Justice Thomas, referring to the historical analysis set out in *Apprendi*, stated that the *Harris* majority's emphasis on penalties that exceed the statutory maximums and unwillingness to extend *Apprendi* to statutory minimums, when measured against the "vital constitutional liberties [could] not withstand close scrutiny." *Harris*, 536 U.S. at 574 (Thomas, J., dissent). Justice Thomas argued that although it was true that *Apprendi* concerned a fact that increased a penalty beyond the prescribed statutory maximum, "the principle upon which it relied appl[ied] with equal force to those facts that expose[d] the defendant to a higher mandatory minimum: When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is by definition an element of a separate legal offense. Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Id.* at 579. Thus, as brandishing a firearm "indisputably alter[s] the prescribed range of penalties

to which [a defendant is] exposed under §924(c)(1)(A)" and thus, is analogous to an aggravated crime with the aggravating fact itself an element of that crime, Id. at 576, the Fifth and Sixth Amendments irrefutably require that "brandishing" be charged in the indictment and proved beyond a reasonable doubt." *Id.* at 480.

In *Blakely v. Washington*, petitioner was charged with second degree, B-felony kidnapping which carried a maximum 10 year sentence. Similarly, the Washington State Sentencing Guidelines ("Guidelines") imposed a guideline range of 49 to 53 months. *Blakely*, 542 U.S. at 299. The Guidelines also specified that a judge could impose an above the standard-range sentence if he found a "substantial and compelling reasons justifying an exceptional sentence." *Id.* The statute required that reasons offered to justify an exceptional sentence could not rely upon factors which were otherwise used in computing the initial sentencing range. *Id.* The judge chose to impose an exceptional sentence of 90 months as it was the court's opinion that petitioner acted with "deliberate cruelty." *Id.* at 300.

This Court unhesitatingly applied a variation of the *Apprendi* rule whose implications, Petitioner argues, goes beyond the rule of law applied in *Harris* and thus, the holding in *Blakely* serves to effectively overrule *Harris*. Initially in its opinion, this Court applied the *Apprendi* rule. However, when faced with respondent's argument that the sentence imposed was within the maximum statutory range of 10 years for a B-felony, the Court amended the *Apprendi* language by holding that "in other words, the relevant "statutory maximum" is not the maximum a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, supra, §87, at 55, and the judge exceeds his proper authority." *Blakely*, 542 U.S. at 304. This pronouncement significantly changes the "*Apprendi*" standard from the one relied upon in *Harris*.

Primarily, the Court's citation to Bishop clearly indicates that the Court moved away from the emphasis it

placed in *Harris* on the distinction between an element and a sentencing factor. Rather, by including this reference, as well as shortening the "ceiling" in its definition of "statutory maximum," the Court has radically moved closer to embracing the arguments made by Justice Thomas in *Apprendi*, i.e., that a "crime includes every fact that is by law a basis for imposing increasing punishment." See, *Apprendi*, 530 U.S. at 510-517(Thomas, J. concurring)(discussing the common law definition of a "crime"). Thus, the so-called sentencing factors in *Harris*, i.e., brandishing or discharging a firearm under §924(c) are, after *Blakely*, arguably within the reach of *Apprendi* as they are facts that certainly provide for an increase in punishment. *Apprendi*, 530 U.S. at 483, n.10 (when a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is "by definition [an] element of a separate legal offense. Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed).

By requiring that the statutory maximum be equated with facts reflected in the jury's verdict or admitted by the defendant, this Court pronounces a rule that is significantly different than the one relied upon in *Harris*. The Court in *Harris* relied upon the pre-*Blakely* definition of statutory maximum in order to distinguish a statutory minimum from a statutory maximum for *Apprendi* purposes. Thus, the holding in *Harris* is significantly undermined as the *Harris* court repeatedly reiterated that because the "ceiling" was the statutory maximum, a sentencing court was within its discretion to sentence anywhere below it. After *Blakely*, it can no longer be argued that facts increasing a minimum sentence are permissible simply because they "do not increase the penalty for a crime beyond the prescribed statutory maximum." Rather, in determining whether facts increasing a mandatory minimum are permissible, a court must evaluate whether the desired facts are reflected in the jury verdict or admitted by the defendant. If they had not been part of the case in chief or admitted by the defendant, then a court cannot consider them in calculating the appropriate sentence. Therefore, with respect to sentencing considerations, *Blakely* equally raises the bar for sentences

above the statutory maximum as well as the statutory minimum. Under *Blakely*, the justification under *Harris* for limiting constitutional protections against increases in mandatory minimums no longer applies as the level of judicial discretion (ability to sentence anywhere within the range up to the statutorily prescribed maximum) has been greatly diminished with the revised definition of "statutory maximum." In fact, with the statutory maximum now exclusively tied to the facts submitted to a jury, a strong potential exists that the facts supporting a mandatory minimum could conceivably become the maximum, as the upper designation of life can no longer be automatically relied upon as the statutory maximum. Thus, *Harris* is no longer good law after *Blakely*.

II.

AS THE MANDATORY NATURE OF STATUTORY MINIMUM SENTENCES SUFFER FROM THE SAME CONSTITUTIONAL INFIRMITIES AS THE MANDATORY NATURE OF THE FEDERAL SENTENCING GUIDELINES, THE COURT'S HOLDINGS IN *BOOKER* AND *CUNNINGHAM* EFFECTIVELY OVERRULED *HARRIS*.

In *Booker v. United States*, the jury found that respondent possessed 50 grams of cocaine with intent to distribute in violation of 21 U.S.C.§841(a)(1). This statute provided for a minimum of 10 years and a maximum of life. The Federal Sentencing Guideline ("Federal Guidelines") prescribed a sentencing range of 210 to 262 months. The judge found, by a preponderance of the evidence that respondent possessed an additional 566 grams of crack. Under the Federal Guidelines, this finding mandated a sentence of 360 months to life. The judge imposed a sentence of 360 months-within the maximum of a life sentence for possession with intent to distribute 50 grams or more as found by the jury, but well above the maximum of 262 months for the 50 grams of cocaine as determined by a jury. *Booker*, 543 U.S. at 226.

This Court held that as the Federal Guidelines were mandatory and binding on all judges, they effectively forced a judge to rely on facts not reflected in a jury's verdict which uncontrollably inflated a defendant's applicable guideline range. *Booker*, 543 U.S. at 235. Thus, due to the mandatory nature and thereby, "force and effect of laws," the Federal Guidelines were in patent violation of a defendant's Sixth Amendment rights. Thus, by implicating the "mandatoriness" of the Federal Guidelines, the Court had in effect, overruled its prior holdings in *McMillan* and *Harris* where the lower courts were mandated by the legislature to impose mandatory minimum sentences. As the Court in *Harris* pointed out, mandatory minimums were created by Legislatures, who were "dissatisfied with sentencing disparities and implemented measures regulating judicial discretion. These systems maintained the statutory ranges and the judge's fact-finding role but assigned a uniform weight to factors judges often relied upon when choosing a sentence." *Harris*, 536 U.S. at 558. See also, *McMillan*, 477 U.S. at 88(simply took one factor that has always been considered by sentencing courts to bear on punishment...and dictated the precise weight to be given that factor).

Thus, as it is undeniable that mandatory minimums have the same effect on sentencing judges as the pre-*Booker* Guidelines, *Booker's* repudiation of the mandatory nature of the Guidelines also holds for mandatory minimums, and as such, *Harris* is again overruled. See, *Booker*, 543 U.S. at 234(if the guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of a particular sentence in response to differing sets of facts, then their use would not implicate the Sixth Amendment); see also, *Cunningham v. California*, 127 S.Ct. at 867(no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in *Blakely*. Both systems were mandatory and imposed binding requirements on all sentencing judges).

In addition, the *Booker* Court provides further support to Petitioner's argument that this Court has expanded beyond the distinction made in *Harris* between the Sixth Amendment's differing application to minimum and maximum sentences. In

summarizing its holding in *Blakely*, the *Booker* court relied upon Bishop's common law definition of "element" as first mentioned in *Apprendi*, when it stated that "the [*Blakely*] court held that the application of the Washington Sentencing scheme violated the defendant's right to have the jury find the existence of *any particular fact that the law makes essential to his punishment*." *Booker* 543 U.S. at 232 (Emphasis added). The *Booker* court again indicates that its holdings since *Harris* included all, rather than just maximum increases in sentences, when it stated that "the right[a jury determination] is implicated whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the jury's verdict or admitted by the defendant." *Id.* The Court chose not to equate the term "sentence" with "maximum" and thus, referred to sentences generally, including minimum sentences. Most broadly of all, the *Booker* court, in reply to the government's argument that the *Apprendi* rule applied to a statute rather than a Guideline scheme, held:

> more important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. Those principles are unquestionably applicable to the Guidelines. They are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law…'to guard against a spirit of oppression and tyranny on the part of rulers…trial by jury has been understood to require that the trial by jury as been understood to require the truth of every accusation…should afterward be confirmed by the unanimous suffrage of 12 of [the defendant's] equals and neighbors.

Booker, 240.

Thus, the *Booker* court reaffirmed the Sixth Amendment's supremacy over distinctions, including "recent innovations" like mandatory minimums. See, *Harris*, 536 U.S. at 560 (mandatory minimum statutes like the Pennsylvania Act,

which alter the minimum sentence without changing the maximum, were for the most part the product of the 20th Century); *Id.* at 580 (Thomas, J. dissenting)(the Court has not previously suggested that constitutional protection ends where legislative innovation or ingenuity begins).

In its most recent holding, this Court in *Cunningham v. California* has further reinforced Petitioner's argument that *Harris* has been undermined and is no longer good law.

In *Cunningham*, this Court held that California's determinate sentencing law that assigned the authority of finding facts exposing a defendant to an elevated upper sentence, was identical in important respects to Washington's determinate sentencing law in *Blakely* and the Federal Sentencing Guidelines in *Booker*. The Court concluded that all three of these systems violated the Sixth Amendment by allowing the judge to increase sentences beyond those permitted by the jury's conviction. In particular, California's Determinate Sentencing Law ("DSL") directed that a sentencing court start with a middle sentencing term and move from that term only when the court itself found by a preponderance of the evidence, facts that go beyond the elements of the charged offense. *Cunningham*, 127 S.Ct. at 867. The Court held that under the Sixth Amendment, any fact that exposed a defendant to a longer sentence must be found by a jury, not a judge and be established beyond a reasonable doubt. *Id.* at 868. Again, the Court's broadened reading of the *Apprendi* rule is reflected in its summarization of its *Blakely* holding: "Broad discretion to decide what facts may support an enhanced sentence or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth amendment requirement is not satisfied." *Cunningham*, 127 S.Ct. at 874.

As with *Booker*, the Court reaffirmed its distaste with the manditoriness of sentencing schemes. *Cunningham, Id.* at 875. The Court held that the DSL did not resemble the advisory system the *Booker* court had in mind. Under the DSL, judges were not free to exercise their discretion to select a specific

sentence within a defined range. Rather, they were required to choose between three fixed sentences without ranges between them. Judges were forced to first choose the middle range unless the judge found one or more facts in aggravation or mitigation. If so, the judge could increase the sentence to 16 years or decrease it to six. *Id.* at 867.

California argued that 16 years was the maximum for *Apprendi* purposes. The Court rejected this claim and held that the middle term, 12 years was the maximum. *Blakely*, 542 U.S. at 303 (maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant). This same "triad" arrangement exists in §924(c) with the default sentence being five years for possession. See, §924(c)(1)(A)(i). Judges were thus without a sentencing range to choose from and like the Washington Sentencing scheme and the Federal Guidelines, were forced to impose the statutorily prescribed sentence. If, by a preponderance of the evidence, a judge found that a defendant "brandished" a firearm, they were mandatorily required to impose the enhancement sentence of seven years. See, §924(c)(1)(A)(ii). Thus, for the same reasons underlying *Blakely*, *Booker* and *Cunningham*, the mandatory minimum scheme of §924(c) must also fall as the explicit holdings and rationale underlying these cases irrefutably overrules this Court's holding in *Harris*. *Booker* 543 U.S. at 642-645 (the Sixth Amendment right to trial by jury is violated where under *a mandatory guideline system* a sentence is increased because of an enhancement based on facts found by the judge that were neither admitted by the defendant nor found by the jury)(Emphasis added).

APPLICATION TO THE FACTS AT BAR

In applying the preceding analysis to the facts at bar, the District court illustrated that it clearly understood this Court's holdings in *Blakely* and *Booker* when it deferred to the jury a determination of whether Petitioner possessed or brandished a firearm beyond a reasonable doubt. This deference reflected the District court's belief that "brandishing" was not merely a sentencing enhancement left to the court's sole determination,

but rather was a fact "which the law makes essential to the punishment" and thus warranted the Fifth and Sixth Amendment protections of a reasonable doubt finding by a jury. In this case, after hearing evidence presented by the Government, the jury determined that Petitioner possessed rather than brandished a firearm. The District court judge recognized that in finding possession, the maximum sentence he could impose was five years as this was the maximum "reflected in the jury['s] verdict." The judge however, second guessed his better judgment and imposed a seven year sentence based upon his own finding of brandishment at the much lower evidentiary standard of preponderance of the evidence. The District court felt bound to respect it superior court, the Ninth Circuit who had also expressed its own reservations in *United States v. Dare* of whether the holdings in *Harris* did in fact, survive after *Blakely* and *Booker*.

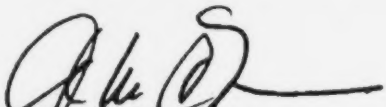
Petitioner argues that the District Court and the Ninth Circuit's intuition, as well as the intuition of other Circuits across the country, were accurate in surmising that *Harris* did not survive this Court's more recent holdings thereby affecting Petitioner's Fifth and Sixth Amendment rights. Thus, Petitioner respectfully requests that this Court address the validity of *Harris* in light of these more recent opinions in *Blakely* and *Booker* which we submit have in fact overruled *Harris*.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Dated: April 5, 2007

Respectfully submitted,
Law Offices of Ann C. Moorman



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